

The ALJ concluded that claimant failed to meet his burden of proof that he sustained an accidental injury on June 10, 2006 or that such an alleged injury arose out

of and in the course of his employment on that date. Thus, all compensation was denied.¹

The claimant requests review of this decision asserting that the ALJ's evaluation of the evidence was wrong and the Award should be reversed on the issue of compensability (both as to accident and timely notice) and remanded to the ALJ for a finding on the nature and extent of claimant's impairment.

Respondent argues the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The primary issue in this case is whether the accident claimant alleges actually occurred and if it did, did claimant give respondent notice of that accident. The parties stipulated into evidence the relevant medical records including claimant's medical histories both before the alleged accident and after. These records show that on June 6, 2006, 4 days before his alleged accident claimant sought medical treatment for a bug bite on his right shoulder and complaints of pain. Thereafter, claimant alleges he was working for respondent when he got out of his truck, in Goodland, Kansas, and tripped on an uneven spot in the pavement. He alleges he twisted his right ankle, turned a somersault and landed on his back, injuring his right shoulder. Claimant testified that his ankle immediately hurt as did his shoulder, but that the ankle was by far the more painful of his conditions.

Claimant maintains that he finished dropping his trailer and then, within 10 minutes of the accident at about 2:00 p.m. in the afternoon on June 10, 2006, he went to the shed on the premises and called his supervisor, Richard Wolfe, on a dedicated phone line, advising him of the accident. Claimant says he did not ask for treatment for his injury. From there, claimant went to his hotel room and proceeded to soak his ankle as he was in a lot of pain.

There are records from the emergency room in Goodland, Kansas from June 10, 2006 which show that claimant appeared for treatment complaining not of ankle pain but shoulder pain following a bug bite that occurred a week earlier. But claimant testified that his visit to the ER occurred on his next visit to Goodland, a few days later.² And he had no real explanation for why the records from this visit do not include complaints for his ankle problem.

¹ The ALJ's Award makes no finding with respect to notice.

² R.H. Trans. at 16.

Claimant also testified that after approximately 10-11 hours after his fall and leaving the drop site in Goodland, he rested at the hotel (soaking his ankle) and then returned to Kansas City. Upon his return, he says he again spoke to Richard Wolfe about his accident and resulting injury. According to claimant's version of this discussion, Mr. Wolfe approved claimant's request to go to his own physician, Dr. Jeff Lawhead.

The records indicate claimant sought treatment from Dr. Lawhead for shoulder complaints. Although claimant says he told Dr. Lawhead of the fall, there is no such notation within the records. Dr. Lawhead's records indicate claimant complained of *bilateral* shoulder pain *with no known* injury and anxiety. Claimant was given cortisone shots to his shoulder and he then returned to work, being dispatched to drop a trailer in Goodland, Kansas on June 11, 2006.

Claimant suggests that it was this trip that gave rise to an increase in his shoulder complaints and that is why he sought treatment at the local ER. He further testified that he contacted his employer after the visit to the ER.³ Yet, the records do not bear out this visit. Rather, the Goodland ER records show that claimant presented himself on June 10, 2006, not at any other time. And Mr. Wolfe denies any phone call or other communication came from claimant on this date about an ER visit or a fall of any kind.

On July 8, 2006, claimant called his employer and took time off. Respondent's records indicate claimant took himself off due to sickness. Indeed, during this period of time claimant sought treatment with his own physician and on July 12, 2006, he only reported shoulder complaints. There was no indication that he was having any problems with his right foot as of that moment in time.

When claimant's absences were noted, his employer (through Darryl Hoag) reviewed its records to determine if claimant was appropriately using his sick leave and had enough time accumulated. It turns out he did not and on July 21, 2006 claimant was given a warning.

Sometime following this second trip to Goodland, claimant also says that he discussed his injury with Darryl Hoag. Claimant indicates that Mr. Hoag approached him and asked where the accident report was for the June 10, 2006 accident. Claimant was at a loss to explain this as he had thought one was already filled out and delivered. So, on July 23rd or 24th, 2006, claimant typed up an accident report and delivered it to respondent's representatives on July 27, 2006.

Once the accident report was filed, the claim was tendered to respondent's carrier but no benefits were forthcoming.

³ *Id.* at 16.

At the regular hearing, the ALJ heard claimant testify in person. There was also additional deposition testimony offered by both Richard Wolfe and Darryl Hoag. Wolfe and Hoag both agreed that before July 27, 2006, neither of them had any knowledge of an accident involving claimant occurring on June 10, 2006. In fact, Mr. Wolfe, the individual that claimant says he spoke to at approximately 2:00 p.m. on June 10, 2006, was not working at the respondent's facility at that time. Mr. Wolfe's regular shift was from 9:00 p.m. to 9:00 a.m. He testified that he never spoke to claimant on that day and claims he could not have done so as it was not a time during which he was working. Moreover, he testified that he has absolutely no authority to allow any hurt employees to go to their own physicians. To the contrary, injured employees are sent to the in-house physician, or if after hours, to Providence Hospital.

Likewise, Mr. Hoag also denies having any conversation with claimant about any accident until July 27, 2006, the day claimant delivered his written claim. And it was Mr. Hoag that determined claimant had abused the sick leave policy over July 8-13, 2006 and decided to issue a warning letter regarding that violation, on July 21, 2006. Mr. Hoag also was ultimately responsible for tendering the workers compensation claim to the carrier so all claims, once given to the dispatchers, would be routed to him.

The ALJ reviewed the evidence and concluded that claimant had failed to prove it was more likely than not that he had sustained an accidental injury arising out of and in the course of his employment on June 10, 2006. Although he did not expressly state as much in the Award, based upon this finding, it is clear that the ALJ had serious doubts about claimant's credibility. The ALJ made no finding with respect to notice.

The Board has considered the entirety of the record and concludes the ALJ's Award should be affirmed. Claimant's defense in this matter is, distilled to its essence, that respondent's representatives are lying (so as to avoid liability for a claim) or there was a miscommunication (in which we should assume the mistake was on Mr. Wolfe's part)⁴, the doctors failed to note *all* of his complaints (because they are careless) and that *respondent* should have produced the dispatcher on duty in order to prove claimant did not call in on June 10, 2006 (as he says he did). The Board is not so persuaded by these arguments.

There are a number of inconsistencies in claimant's recitation of the events which lead the Board to conclude that claimant is less than credible. First, claimant is absolutely certain in his testimony that he spoke with Mr. Wolfe at approximately 2:00 pm on June 10, 2006. There is nothing vague in his testimony on this point. According to Mr. Wolfe, he does not work in the afternoons, as his 12 hour shift begins at 9:00 pm and ends at 9:00 a.m. The record makes it clear that Mr. Wolfe would not have been at respondent's place of business for claimant to call on the dedicated line.

⁴ Claimant's Brief at 4 (filed Nov. 26, 2008).

Next, claimant says that his foot injury was so painful after the fall that he went to the hotel to soak it. The records indicate that on that same day he presented to the ER in Goodland, Kansas with shoulder complaints. He related his right shoulder pain to a bug bite, one he'd been treated for on June 6, 2006 by his own physician. There is absolutely no mention of foot pain, an accident, a fall, or an injury. And claimant says this visit didn't occur until days later after his next return to Goodland. Setting aside the claimant's inconsistency with respect to the date he went to the ER, it is improbable that claimant's ankle could be so painful as to require immediate and extended soaking and then when he presented to the ER, his complaints were limited to his shoulder, without any reference to an accident or his ankle.

Claimant then claims when he returned from Goodland he spoke to Mr. Wolfe again about the accident. But as his testimony develops, it may be that this alleged conversation didn't occur until after claimant's next trip to Goodland. In either event, claimant maintains that Mr. Wolfe agreed to let him seek treatment from his own physician, something that Mr. Wolfe testified he had no authority to do (even assuming he conceded the conversation actually occurred, something he denies). It seems highly implausible that Mr. Wolfe would agree to allow claimant to proceed to his own physician when that was in direct contravention of the employer's policy. This is particularly so when claimant had sustained earlier accidents and knew well that it was respondent's policy to send injured employees to a dedicated physician (not Dr. Lawhead) or if after office hours, to Providence Hospital.

Claimant also took approximately a week off, calling in sick. While claimant maintains that his absence was not due to illness but rather, due to his injury, respondent's records do not bear that out. His absence was noted as "OOSS" which means out of service-sick. Had respondent known of any injury and claimant's inability to work due to that injury, another notation would have been used. Claimant maintains respondent's records are wrong and are part and parcel of its failure to recognize his work-related injury. If these records were the only piece of evidence on this issue, claimant's argument may well find some traction. But it is not.

During this week away from work claimant sought treatment from his physician. And while the physician's notation indicates that claimant's shoulder pain was the result of a fall, there is no indication that the fall occurred at work. Further, there is no mention of a foot complaint anywhere in this record. Again, claimant stridently testified that his ankle was so injured that he had to soak it immediately after the fall and was compelled to seek out treatment from the local ER (either on June 10th, as the medical records suggest or on June 11th, as claimant believes). Yet, none of the records indicate any such complaint, until August 11, 2006.

Only after claimant is given a warning for his absences does he complete a typed accident report which was served upon respondent on July 27, 2006. Claimant maintains that the first accident report was lost and he was compelled to retype it on July 23rd or 24th, finally submitting it on July 26th or 27th.

Each event or fact, taken individually, might not give rise to a serious doubt. But when taken as a whole, the Board can easily see why the ALJ concluded that claimant failed to meet his evidentiary burden in this matter. After reviewing the entire record, the Board agrees with the ALJ's findings and conclusions. The ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated October 15, 2008 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge